

Parole for eligible asylum seekers: Under current law, asylum seekers who present themselves at our borders or ports of entry seeking protection are detained as “arriving aliens.” This classification subsumes the legitimacy of their appearance at U.S. borders and ports of entry, which is contemplated in the statute designed to ensure the United States’ own compliance with the United Nations Protocol on the Status of Refugees. They must meet strict requirements to win release or parole, including demonstrating to ICE that their release is in the “public interest,” an undefined term that does not encourage immigration officials to grant release. In addition, asylum seekers who apply after entry to the U.S. may be detained while their cases are pending.

Recommendations:

- Rescind the November 2007 ICE parole guidelines and issue new guidelines which use the parole criteria included in the December 30, 1997 parole policy. Require that all arriving asylum-seekers be considered for parole automatically within a reasonable timeframe, and include a mechanism for review of the parole decision. In addition, reinstate the February 9, 2004 Release after Grant Memorandum permitting release for individuals granted asylum or withholding of removal protection.
- Provide asylum seekers access to the immigration courts for custody hearings, rather than subjecting them to detention by default as “arriving aliens,” by amending 8 CFR 236.1(c)(11).

Protect Unaccompanied Children: Under the Homeland Security Act of 2002 (HSA), all non-citizen children under the age of 18 who are not in the physical custody of a parent or legal guardian at the time of apprehension should be considered “unaccompanied alien children.” When federal authorities take unaccompanied immigrant children into custody, they are required by law to transfer them to the care and custody of the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services within 72 hours. However, ICE and Customs and Border Patrol regularly hold minors in custody for longer periods of time.

A settlement in a landmark legal case, *Flores v. Reno*, 507 U.S. 292 (1993), requires that unaccompanied immigrant children be held in the least restrictive setting possible. The *Flores* settlement also requires that children be released from detention, whenever possible, to an individual or entity able and willing to ensure both the child’s safety and his or her timely appearance in immigration court.

The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110-457, was signed into law December 23, 2008. The bill will help protect child victims of trafficking, children at risk of being trafficked and other vulnerable children. The following recommendations will facilitate DHS compliance with the new trafficking law.

Recommendations:

- Develop procedures to screen unaccompanied minors from Mexico and Canada within 48 hours of apprehension to ensure that children who may seek asylum or who are victims of trafficking or are at risk of being trafficked are not repatriated.
- Comply strictly with legal requirements that all children not in the physical custody of a parent or legal guardian at the time of apprehension be transferred to ORR within 72 hours, or be reunified with family (so that they are not rendered unaccompanied).
- Develop procedures to transfer unaccompanied minors to ORR custody within 72 hours.
- Provide training to all federal personnel who have regular or substantive contact with unaccompanied minors.
- Adopt the forthcoming HHS age determination procedures.

- Codify the *Flores* settlement in regulation.

Prevent family separation and the termination of parental rights: More than five million children in the U.S., three million of them U.S. citizens, have at least one undocumented parent.⁶³ 108,434 parents of U.S. citizen children were deported between FYs 1998 and 2007. When parents are detained and/or deported, their children can end up in the U.S. child welfare system, at great economic and social cost to the country and at great detriment to children's best interest. As ICE enforcement operations have increased, and in particular as local and state authorities have become more involved in immigration enforcement, there are an increasing number of cases in which parental rights are threatened or terminated.

In November 2007, ICE issued non-binding guidelines that require agents conducting enforcement operations to screen for humanitarian concerns.⁶⁴ Under these guidelines sole caretakers are to be identified and considered for placement in an alternative to detention program or released on their own recognizance. However, these guidelines only apply to individuals apprehended in operations involving more than 150 arrests. No guidelines apply to smaller enforcement operations, even though the majority of raids involve fewer than 150 arrests. In addition, there are no consistent procedures for evaluating humanitarian needs and addressing child welfare concerns that arise from local and state law enforcement actions in conjunction with INA § 287(g) agreements. Many of the people apprehended in smaller raids and local and state enforcement activities are detained, often in facilities far from their place of residence, and often without any opportunity to make arrangements for the care of their children.

The detention and deportation of parents can result in permanent separation from their children, and even loss of custody. There is no requirement that parents taken into ICE custody are informed of the whereabouts of their children, or that parents be afforded time and resources necessary to establish care arrangements. As a result, after parents are apprehended, children may be in a tenuous situation with relatives or friends. However, if the parent was not allowed to contact a caregiver or does not have any relatives or friends able to care for the children, children may be placed in state foster care.⁶⁵ Placement into the child welfare system raises particular due process concerns because the Adoption and Safe Families Act terminates the parental rights of anyone whose child has been out of the custody of their parents and in the child welfare system for 15 of the previous 22 months (or 6 months if the child is under three years of age). There are no carve-out protections under this law for parents who are being detained and separated from their children against their will, and there are no provisions that facilitate immigration detainees' ability to communicate with Family Court or Child Protective Services.

Even if a parent is cognizant of their children's whereabouts, there is no consistent policy guaranteeing them access to family court proceedings. Because many parents are placed in facilities out of state or in rural areas far from courts, there may be no way for the parent to physically attend custody hearings

⁶³ National Council of La Raza (NCLR) and the Urban Institute, "Paying the Price: The Impact of Immigration Raids on America's Children," 2007, available at http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf.

⁶⁴ U.S. Dep't of Homeland Security, Immigration and Customs Enforcement, "Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees When Conducting Worksite Enforcement Operations," available at http://www.nilc.org/immsemplymnt/wkplce_enfrcmnt/ice-hum-guidelines.pdf.

⁶⁵ ICE and child welfare departments do not track these cases so it is impossible to know how many children have been institutionalized as a result of enforcement actions. While we are observing this developing trend, we do not have the data to prove its scale.

or comply with court orders. In addition, while in detention, they may not even receive notification about custody hearings and court case plans. Even if they are appointed an attorney to assist them in family court, these attorneys are usually not familiar with immigration law and court proceedings, and are unable to communicate with their client in their native language.

As a result of these obstacles parents are increasingly being deported and forced to leave their children (including U.S. citizen children) behind. In some cases this is because their parental rights were terminated. In other cases the parent has decided to leave children behind. However, many parents who are deported want to take their children with them but cannot do so because of legal hurdles, difficulty obtaining the necessary documentation for the child, financial or logistical constraints. These children remain in the U.S. without the protection and support of their parents. They are likely to become a drain on our welfare system, and child welfare agencies do not have the resources to serve this population.

One report by the University of Arizona interviewed 21 women detainees in Arizona. All but three were separated from U.S. citizen children. Four women confronted difficulties reaching Child Protective Services and could not locate their children. Two were concerned that their children had been given to abusive spouses. One woman was in the midst of a custody dispute over her two daughters when she was detained. For five months, she had struggled to communicate with Child Protective Services because of the cost of phone-calls.⁶⁶

In another example, in West Virginia, a mother was stopped for carrying false identification. In West Virginia, if a parent does not have contact with a child for 6 months, the state can terminate parental rights. Because the woman was in immigration detention, she was unable to see her child. Even though she was writing letters begging to see her child, her parental rights were terminated after 8 months of immigration detention.⁶⁷

Recommendations:

- All parents of minor children apprehended through enforcement activities, including INA § 287(g) agreements, should be immediately identified by ICE, evaluated by social workers for humanitarian concerns and permitted to make short term care arrangements for their children. If children are present at the time of apprehension, all care should be taken to minimize trauma and allow the parent to communicate and remain with the child until the parent is released or until arrangements can be made for the care of the child.
- Sole caregivers should not be detained absent exceptional circumstances. ICE should utilize community-based alternatives to detention for such individuals.
- Parents in immigration proceedings, including those in detention, have the right to participate fully in family court proceedings if such proceedings are necessary. ICE should ensure that parents are able to fully participate in family court proceedings.
- Parents who are ordered deported should be permitted to make decisions in the best interest of their children and provided time to obtain passports and visas for U.S. citizen children who will accompany them on their return to their country of nationality, if the parents so choose

Protect Crime Victims

⁶⁶ University of Arizona, "Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona."

⁶⁷ Correspondence from Women's Refugee Commission, Feb. 2009.

Over the past 18 years, most significantly in the 1994 Violence Against Women Act (VAWA), Congress has created and expanded several forms of immigration relief for non-citizen victims of domestic violence, sexual assault, trafficking and other crimes. The most notable of these are the “VAWA self-petition,” the U visa, and the T visa. In spite of clear direction from Congress, ICE has not always demonstrated support for these victims of crime.

ICE’s priority is law enforcement; hence, its agents are not always trained to identify victims of domestic violence, sexual assault, and other crimes. ICE officers should refer self-identified victims to crime victim advocates and agencies that work with non-citizen crime victims. DOJ’s Office on Violence Against Women provide technical assistance and offers best practices to state and federal law enforcement offices. This office recommends that prosecutors and local police partner with advocates who specialize in working with victims of crimes. ICE should take steps to develop comparable relationships.

Unfortunately, ICE has detained and deported some victims of crimes. These victims are often already in the process of cooperating with state, local, or federal law enforcement authorities in the investigation or prosecution of a crime. By locking up victims without regard to these special circumstances, ICE thwarts the intent of Congress in creating special immigration relief for victims of crimes and undermines the relationship that local, state, or federal law enforcement agencies have built within their communities. Moreover, locking up and deporting victims of crimes in immigration detention prisons re-traumatizes them and limits or nullifies their ability to help other branches of law enforcement. It is a waste of tax dollars to detain and deport victims of crimes who, in all likelihood, will prevail in their applications for administrative immigration relief. Detention priorities should reflect national priorities, and fighting crime and helping crime victims should trump detaining or removing people based on their lack of documents.

Recommendations:

- Institute a policy to release immediately victims who are arrested in an enforcement action who can show they have filed a VAWA self-petition as defined at 8 U.S.C. 1101(a)(510) or applied for a U or T visa.
- Issue policy guidance instructing ICE to refrain from detaining victims of crimes and to release victims of crimes from detention using any and all tools at their disposal, such as parole, deferred action, and stays of removal. (See also guidance memorandum, DOJ/INS, Michael Cronin (August 30, 2001): Victims of Trafficking and Violence Prevention Act of 2000 (VTVPA) Policy Memorandum #2 – “T” and “U” Nonimmigrant Visas).
- Restore the spirit of previous policy guidance memoranda which instructed ICE to de-prioritize detention and removal of special victims of crimes and to focus instead on keeping them in the U.S. (See also guidance memorandum, USCIS, William Yates (October 8, 2003): Centralization of Interim Relief for U Nonimmigrant Status Applicants).
- Issue supplemental guidance to the DHS/ICE guidance memorandum of October 18, 2004, detailing “detention priorities,” to list victims of crimes and VAWA self-petitioners as defined at 8 U.S.C. 1101(a)(51) as “Not A Priority.” (See also guidance memorandum, DHS, Asa Hutchinson (October 18, 2004), Detention Prioritization and Notice to Appear Documentary Requirements.

- Allow outside advocates specializing in domestic violence, sexual assault, and other crimes to interview non-citizens detained after a raid or other enforcement action before they are transferred or removed. The federal Office of Violence against Women (OVW) within the Department of Justice and state coalitions on domestic violence, sexual assault, and victims of crimes should determine appropriate advocates for this purpose.

C. Secure, Community-Based Alternatives to Detention.

Pursuant to human rights principles, immigration detention should be used as a last resort and only when custody is necessary to meet the legal objectives for which it is intended. Alternatives to detention (ATDs) allow DHS to enforce immigration laws in a more responsible, cost-effective, and humane manner than traditional detention. ATD programs release individuals from custody and, through monitoring and the delivery of services, ensure compliance with the immigration laws.

In many cases, ICE has discretionary authority to determine whether to release a non-citizen from detention. Rather than detain tens of thousands of non-citizens at the cost of approximately \$95 per person per day, ICE should expand the use of community-based ATD programs, which cost as little as \$12 per day on average.⁶⁸ In 2007, the government spent \$1.2 billion dollars on detention. Meanwhile, DHS has not implemented any cost-saving community-based ATD programs despite having \$43.6 million appropriated for such programs.⁶⁹

Rather than using funds appropriated for ATDs to create community-based programs, ICE uses this funding for private sector custodial programs that use electronic ankle bracelets or impose intrusive, burdensome monitoring requirements. ICE has the authority to release non-citizens on recognizance, on an order of supervision, or bond; however, ICE currently uses such options in extremely limited circumstances. Individuals who are otherwise eligible for release on their own recognizance are instead placed on electronic bracelets making it difficult for them to work and pursue other daily activities.

ICE has generally resisted using alternative programs that connect individuals with community-based services, including legal assistance, despite evidence that community-based services help improve court appearance rates. Pilot community-based alternative programs have proven successful and cost-efficient. Between 1997 and 2000, the Vera Institute of Justice coordinated a highly successful alternative program through a contract with legacy INS.⁷⁰ Participants were required to report to the Vera Institute and were provided with legal information, referrals and court date reminders. The Vera Institute reported a 93% appearance rate for the asylum seekers in its program. These programs also help ensure that non-citizens in proceedings have meaningful access to counsel, in contrast to individuals in detention, among whom only approximately 10% obtain counsel.⁷¹ The main alternative

⁶⁸ “An Evaluation of the Appearance Assistance Program,” Vera Institute of Justice, Aug. 1, 2000, available at http://www.vera.org/publication_pdf/aapfinal.pdf

⁶⁹ In April 2006, the DHS Office of the Inspector General recommended that DHS, “Intensify efforts to obtain the resources needed to expedite the development of alternatives to detention to minimize required detention bed space levels,” however ICE has not increased such programs. See “Detention and Removal of Illegal Aliens,” Office of Inspector General, Department of Homeland Security, OIG-06-33, April 2006, at 23; available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_06-33_Apr06.pdf.

⁷⁰ “An Evaluation of the Appearance Assistance Program,” Vera Institute of Justice, Aug. 1, 2000, available at http://www.vera.org/publication_pdf/aapfinal.pdf

⁷¹ According to The Washington Post’s recent series on health care in immigration detention, only one in ten detained

program used by ICE over the last few years did not go as far as the Vera program in its efforts to connect individuals with community-based organizations and legal counsel.

Recommendations:

- Create a nationwide community-based alternatives program implemented in partnership with reputable and experienced not-for-profit organizations which have as a component the facilitation of access to legal counsel and social services.
- Develop related written guidance on ATDs and Release on Recognizance (ROR) for dissemination to all ICE field offices. Establish protocols for maximizing the use of ROR and orders of supervision, complemented by appearance assistance services through reputable community-based organizations.
- Provide detailed analysis of current detention bed space needs, assess cost savings for shifting to alternatives programs, and analyze and reject future calls for additional detention bed space funding from Congress.

D. Prolonged Detention/ Electronic Travel Documents

ICE should continue to expand programs to facilitate the arrival of electronic travel documents. This program should reduce the amount of time in detention for many detainees. For detainees who are not able to obtain travel documents because their country of origin will not accept them, ICE should not force detainees to remain in detention while contacting dozens of other countries to request travel documents.

Limit prolonged detention: U.S. Supreme Court decisions in 2001 and 2005⁷² require that immigrants who have been ordered removed be detained no longer than reasonably necessary for deportation, typically no longer than 180 days. In recent years, however, the government has frequently violated this rule, forcing detainees who are commonly unrepresented to file petitions for writs of *habeas corpus* to obtain release. Individuals have also been required to remain in detention while the detainee or his representatives write to dozens of countries requesting that these countries except the detainee. Such noncompliance flouts justice, burdens the federal courts, and forces taxpayers to pay the cost of unlawful and prolonged detention.

In March 2007, the Department of Homeland Security's Office of Inspector General (OIG) released a report reviewing ICE compliance with U.S. Supreme Court rulings on indefinite detention.⁷³ The OIG found that ICE failed to provide detainees with prior notice of custody reviews, information about how they can cooperate in removal efforts, or decisions that clearly explain why supervised release has been denied. OIG attributed many of these failures to inadequate staffing at local ICE Field Office levels, and at the ICE Headquarters level, which leads to insufficient oversight of local custody decisions.

immigrants have legal representation. Dana Priest and Amy Goldstein, "As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost," *The Washington Post*, May 11, 2008, available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_dlp1.html. In fiscal year 2006, only 48% of all non-citizens were represented by counsel in immigration court proceedings. See United States Department of Justice, Executive Office for Immigration Review, FY 2006 Statistical Year Book, G1 (2007).

⁷² *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005).

⁷³ U.S. Dep't of Homeland Security Office of Inspector General, "ICE's Compliance With Detention Limits for Aliens With a Final Order of Removal From the United States," OIG-07-28, Feb. 2007, available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-28_Feb07.pdf.

Recommendations:

- Mandate strict compliance with the reasonable limitations on detention established by the Supreme Court.
- Follow the requirements of the statute for post-removal order detention that provide a 90-day “removal period,” after which supervised release shall be granted, except in exceptional circumstances that are documented and reviewed by the agency after a second 90-day period.
- Ensure judicial review of post-90 day detention.
- Report to Congress regarding how many people are held longer than 90 days.

IV. Basic Pilot/E-Verify Program

The Basic Pilot/E-Verify program alone cannot prevent unauthorized immigration at the worksite. The existing program is both over-inclusive and under-inclusive and must be improved significantly prior to broad expansion. E-Verify results in a number of unintended consequences including wrongful determinations of ineligibility for employment and misuse of the system by employers. At the same time, it does not screen out all undocumented workers because the program is vulnerable to identity fraud and theft. Both of these issues will be exacerbated if the program is expanded without legalizing the current undocumented population. Large-scale expansion of E-Verify in the absence of legalization of a sizable portion of the undocumented immigrant population will also likely contribute to the growth of the underground economy, and exacerbate, not decrease the incidences of identity “borrowing” (as opposed to identity theft) for the purposes of evading E-Verify’s review.

Halt further expansion of Basic Pilot/E-Verify until DHS comprehensively reviews the program.

Rather than supporting mandates for the rapid growth of the existing program, the Obama Administration should halt any major expansion until it undertakes a comprehensive analysis of current and potential problems, and consider a number of modifications to ensure that the program accomplishes its goals.

Recommendation:

- Withdraw Federal Acquisition Regulation (73 FR 67651), published on November 14, 2008 and reverse Executive Order 13465, June 6, 2008. In addition to representing a major expansion of the program, parts of the final rule may be illegal. The final rule requires that contractors must re-verify existing workers assigned to the contract and may re-verify all existing workers, whether or not they are assigned to the contract. The Basic Pilot statute only authorizes the use of the pilot program to verify new hires.

Better understand and fix SSA and DHS database errors. Based on the government’s own statistics, we know that 3.9 percent of workers receive tentative nonconfirmations (TNCs) from Basic Pilot/E-Verify.⁷⁴ Of the 3.9 percent, a small subset – only 0.37 percent -- of workers successfully challenge the TNC finding and are found to be work authorized.⁷⁵ However, we do not know what portion of the remaining 3.5 percent of workers who receive a TNC are work-authorized because so few challenge the TNC finding. Many legal workers do not appeal TNCs, either because they are not fully informed of their right to appeal a TNC or because they simply change employers to avoid the

⁷⁴ Fact Sheet: E-Verify Statistics, USCIS, last updated Feb. 10, 2009, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f82d8557a487a110VgnVCM1000004718190aRCRD&vgnnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD>.

⁷⁵ Id.

burdensome appeals process. While the number of database errors has decreased, the rates of inaccurate TNC and final nonconfirmation will remain a significant problem if the system is expanded through new mandates without additional reforms.

Recommendations:

- Obtain an accurate measure of the Basic Pilot/E-Verify error rate. We need to better understand the population of workers who receive final nonconfirmations and why they received them.
- Conduct a comprehensive audit of the accuracy, data errors, and/or omissions in all records systems and databases, whether paper-based, electronic, or both, that are used to verify whether an individual is authorized to work in the United States.
- Establish a high-level public/private Employment Verification Commission charged with making recommendations related to the costs associated and staffing associated with database improvement; the technology needed for database improvement; the quality assurance necessary for improved data entry; how existing mechanisms and programs used to fix database errors can be improved; and privacy protections.

Establish Due Process. The E-Verify program lacks adequate due process protections for workers that receive TNCs despite being lawfully eligible to work. Workers have no right to review and correct their E-Verify records prior to being subjected to the verification process and have no right to appeal an erroneous final non-confirmation, or to recover lost wages if they are terminated as a result of system errors.

Recommendations:

- Until the databases are analyzed and improved, shift the burden to the government to prove that an individual is ineligible to work rather than requiring an individual to challenge a TNC to disprove the nonconfirmation.
- Allow workers to view their own records and contact the appropriate agency to correct any errors that exist.
- Establish a complaint and redress process for workers wrongly nonconfirmed by the system.

Address employer misuse of Basic Pilot/E-Verify. Misuse of E-Verify has been a problem since the program was implemented in 1997. In the latest evaluation of the program, researchers found that “the rate of employer noncompliance with the program rules is still unacceptably high.”⁷⁶ USCIS oversight of employer compliance is inadequate. As of November 2008, only 82 USCIS employees were assigned to monitor employer compliance with E-Verify requirements, meaning that, on average, each compliance agent was responsible for overseeing 1,100 participating employers. Furthermore, these compliance agents are primarily responsible for ensuring that employers screen new hires. USCIS does not assign any agents to the task of ensuring employer compliance with the workers protections outlined in the E-Verify memorandum of understanding (MOU).⁷⁷

Recommendations:

- Increase USCIS staff charged with ensuring compliance with the MOU.

⁷⁶ “Interim Findings of the Web-Based Basic Pilot Evaluation; Report Submitted to the Department of Homeland Security” Westat, Dec. 2006, available at http://www.nilc.org/immsemplymnt/ircaempverif/westatinterimreport_webbasicpilot_2006-12.pdf.

⁷⁷ A sample MOU is available at <http://www.uscis.gov/files/natedocuments/MOU.pdf>.

- Develop penalties for employers who do not comply with the MOU. Currently, the only penalty is that an employer will be terminated from use of the program, but we understand that even this penalty has never been invoked.
- Require the DHS Office for Civil Rights and Civil Liberties to conduct annual civil liberties impact assessments of the program that include, but are not limited to, a review of employer compliance with E-Verify system requirements; a review of the adequacy of E-Verify rules and procedures to protect authorized workers; a review of whether the program is being managed in a manner that appropriately addresses and anticipates civil rights and civil liberties concerns; and recommendations for additional actions needed to address civil rights and civil liberties concerns.

Evaluate the photo screening tool. USCIS began to use a “photo screening tool” with E-Verify beginning September 2007.⁷⁸ The tool allows an employer participating in E-Verify to check the photos on Employment Authorization Documents (EAD) or Permanent Resident Cards (green cards) against images stored in USCIS databases. Currently, the photo screening tool can be used only for EADs and green cards, however, which means that employers face different employment verification responsibilities depending on whether the potential employee is a non-citizen with an EAD or green card, or is a U.S. citizen. Employers may be unreasonably suspicious of citizens who look or sound “foreign,” suspecting the potential employees of claiming U.S. citizenship in order to avoid a photo comparison. The program gives employers an incentive to avoid hiring lawful immigrants because, in so doing, the employers would have to conduct an additional verification step, raising the cost of hiring non-citizens. The program may also encourage employers to violate the Immigration and Nationality Act’s anti-discrimination provisions, which prohibit employers from demanding certain documents from workers to prove their employment eligibility. Employers may require non-citizens to present documents that can be checked against the photo screening tool to protect employers against a claim that they hire undocumented workers. Conversely, because the screening tool is limited in scope, it is unlikely to serve as an effective deterrent against identity fraud, as unauthorized workers may still present data belonging to U.S. citizens and others not covered by the photo screening tool.

Recommendations:

- DHS should study the photo screening tool to determine if it has lead to increased discrimination against lawful immigrants and naturalized citizens.
- DHS should study the photo screening tool to determine its effectiveness in reducing identity fraud.

V. SSA No-Match

Rescind Social Security No-Match Regulations. Bush Administration regulations designating Social Security Administration (SSA) “no-match” letters as proof that an employer violated immigration law should be rescinded. Although the rule was finalized, a Federal judge enjoined implementation of the final rule,⁷⁹ leading DHS to issue a supplemental final rule⁸⁰ in October of 2008. In early January 2009,

⁷⁸ Fact Sheet: E-Verify, USCIS, Sept. 25, 2007, available at <http://www.immigration.com/newsletter1/fseverify25sep07.pdf>.

⁷⁹ Order Granting Preliminary Injunction, (Oct. 10, 2007, N.D. Cal.), AFL-CIO v. Chertoff, No. C 07-07772 (N.D. Cal. filed August 29, 2007).

⁸⁰ Supplemental Final Rule, “Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification,” 73 FR 63843-67 (Oct. 28, 2008) available at <http://edocket.access.gpo.gov/2008/pdf/E8-25544.pdf>.

the government filed an unopposed motion to extend the briefing schedule until April 2009 in order for the incoming Obama Administration to review the rule.

The effort to redirect the SSA from its core mission of providing benefits and turn it into an agent of the Department of Homeland Security is deeply misguided. SSA no-match letters were never intended to be an immigration-enforcement tool. Bootstrapping them into such a role will have harmful consequences for U.S. workers and employers. At a time of profound economic insecurity, implementation of the no-match initiative will create greater instability. Authorized workers, including U.S. citizens and legal permanent residents, may lose their jobs and small businesses may begin to operate “under the table.” An economic analysis by the U.S. Chamber of Commerce estimated that the new no-match rule could result in 165,000 lawful U.S. workers losing their jobs at a cost to employers of approximately \$1 billion per year, not to mention the cost to the government in lost federal tax revenues.

Recommendations:

- Enter into a settlement agreement stipulating that the government will not implement the no match rule.
- Rescind Final Rule 8 CFR Part 274a (ICE 2377-06; DHS Docket No. ICEB-2006-0004): Safe-Harbor Procedures for Employers Who Receive No-Match Letter and the Supplemental Final Rule (73 FR 63843), published on October 28, 2008.
- Amend the current SSA “Social Security Statement” to highlight the importance of updating name changes due to marriage, divorce, naturalization, etc., and correcting Social Security number errors.

VI. Border Security

The Obama Administration must pursue smart, fiscally responsible border policies that enhance security and reflect an understanding of the vitality and dynamism of our borders.

Recognize the border as a dynamic locale that serves our nation through enhanced commerce and mobility: Congress has appropriated billions to “secure” the border without fully recognizing the important role that cross-border commerce and travel play in enhancing our security. A priority must be placed on developing better, mutually enhancing relationships with Canada, Mexico, and the Central American governments.

Recommendations:

- Improve the infrastructure at ports of entry to ensure ease of access, minimize costly and unnecessary delays, and provide a better and safer atmosphere in which CBP inspectors can complete the necessary screening and inspections of visitors.
- Develop a new North American strategy to enhance intelligence-sharing, manage our borders, combat human trafficking, gun and drug smuggling, and protect against other threats.
- Develop enhanced interstate and international agreements that ensure that repatriated unaccompanied alien children who are nationals of contiguous countries are returned to stable and appropriate settings.

Reevaluate existing border strategy: The Administration should fully assess its border strategy, including all border construction projects, to determine whether they are feasible, environmentally sound, cost effective, and offer the best solution for a given section of the border. The need to revisit current border policy is a fiscal imperative. The requirement imposed by Congress to build 700 miles

of barriers along our borders has been, and will continue to be, costly. The cost of pedestrian fencing has ranged widely, from \$400,000 to \$15.1 million per mile, with the average cost of pedestrian fencing as high as \$3.9 million per mile.⁸¹ Vehicle barriers average \$1.0 million per mile.⁸² Many security experts have questioned the effectiveness of fencing—including Secretary Chertoff, who has said that what we need is “a 21st-Century virtual fence ... not ... old-fashioned fencing...”⁸³ Barrier placement in border towns has profoundly affected area residents and increased border deaths, as undocumented migrants now cross through treacherous deserts and mountains. Two of America’s closest allies — Mexico and Canada — have voiced grave concerns about these barriers, comparing them to the Berlin Wall.

Recommendations:

- Review current border fencing construction and consider the use of “smart border technology” rather than expensive fencing projects.
- Conduct an audit and revise border watch lists to ensure that the lists are accurate and effective.
- Review the establishment of Zero Tolerance Zone policies along the border that require all undocumented migrants to be criminally prosecuted.

Use of the National Guard at the Border: While use of the National Guard at the border gives DHS access to additional agents, a military presence along the Southern border is not justified. Immigration law enforcement is a federal, civil law enforcement activity. Only agents who have been thoroughly trained in immigration law, ethics, and civil and human rights should be enforcing U.S. immigration and customs laws. The constitutionality of using military troops along the southern Border should be reviewed.

Operation Streamline: Operation Streamline is a “zero tolerance” border enforcement program that targets even first time undocumented border-crossers. Instead of routing non-violent individuals into civil deportation proceedings, Operation Streamline forces undocumented migrants into the federal criminal justice system and into U.S. prisons. Those who are caught making a first entry are prosecuted for misdemeanors punishable by up to 6 months in prison, and those who reenter after deportation may be prosecuted for felonies punishable by up to 20 years in prison. Under this fast-track program, a federal criminal case with prison and deportation consequences is resolved in 2 days or less.⁸⁴

This heavy handed program diverts scarce resources and strains U.S. courts, particularly in the Southwest. Federal judges, prosecutors, and defenders report that the explosion in immigration prosecutions siphons resources from other criminal prosecutions and erodes morale among federal lawyers who spend much of their time on misdemeanor illegal entry cases. Just five of the country’s 94 federal districts (So. Cal., NM, AZ, W. TX, and So. TX) handle 75 percent of all criminal cases in federal district courts nationwide.⁸⁵ Meanwhile, local law enforcement often lacks the finances or authority to prosecute these cases effectively.

⁸¹ Letter from Government Accountability Office to Congressional Committees regarding Secure Border Initiative Fence Construction Costs, January 29, 2009, at pp. 3-4, available at <http://www.gao.gov/new.items/d09244r.pdf>.

⁸² Id.

⁸³ “Smart Fence, Not Stupid Fence, Says Chertoff,” National Defense Magazine, Feb. 2006, available at <http://www.nationaldefensemagazine.org/archive/2006/February/Pages/SecurityBeat5434.aspx>

⁸⁴ Amended Written Statement of Heather E. Williams, First Assistant Federal Public Defender, District of Arizona – Tucson, June 25, 2008, Before the United States House of Representatives, Subcommittee of Commercial and Administrative Law, Oversight Hearing on the “Executive Office for United States Attorneys,” available at <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf>, at 4.

⁸⁵ Russell Goldman, “What’s Clogging the Courts? Ask American’s Busiest Judge,” July 28, 2008, ABC News, available at

Operation Streamline prioritizes the criminal prosecution of undocumented migrants above core law enforcement priorities and community security. During the Bush Administration, the annual count of federal criminal prosecutions for immigration offenses more than quadrupled while federal prosecutions of traditional criminal priorities withered.⁸⁶ Between 2003 and 2008, white-collar prosecutions fell by 18 percent, weapons prosecutions shrank by 19 percent, organized crime prosecutions fell by 20 percent, public corruption prosecutions dropped by 14 percent, and drug prosecutions declined by 20 percent.⁸⁷ Alternatively, nearly 80,000 immigration prosecutions were filed in fiscal year 2008, compared to 39,458 in the previous year and 16,310 in fiscal year 2001.⁸⁸ During the single month of February 2008, criminal immigration cases made up the majority of new federal criminal prosecutions nationwide - about 7,250 out of 13,500 - and outnumbered all white-collar, civil rights, environmental, and other criminal cases combined.⁸⁹

Recommendations:

More information on the true impact of Operation Streamline is required. The Administration should temporarily suspend Operation Streamline, pending completion of a comprehensive review of DHS and DOJ criminal operations. Suspending Operation Streamline would not prevent federal prosecutors from initiating illegal entry prosecutions in individual cases in which prosecutors believe such charges are appropriate. A review should include:

- A study of numbers of federal prosecutions of white collar crimes, organized crimes, environmental crimes, civil rights crimes, drug trafficking, human smuggling, and other crimes between 2005 and 2009;
- A study of federal convictions obtained under Operation Streamline including number of non-violent immigration offenses;
- A comparison of rates of federal prosecutions and convictions in districts along the southern border in relation to other districts nationwide;
- Interviews with criminal defense attorneys who represented defendants charged under Operation Streamline to ascertain whether arrestees were provided the opportunity to consult with immigration attorneys prior to conviction, and the ratio of criminal defendants to defense attorneys;
- Interviews with the U.S. Marshal Service, federal court judges and court personnel regarding the effect of increased illegal entry prosecutions;
- Reporting on terms of imprisonment, names, and locations of prisons used for those arrested under Operation Streamline; and
- Cost calculations for detentions, prosecutions, and incarcerations under Operation Streamline.

Modify excessive waiver authority: Section 102 of the REAL ID Act of 2005 gave the Secretary of Homeland Security authority to waive all legal requirements related to the construction of fences. This authority was interpreted by the Bush Administration in its broadest terms—to apply not only to all

<http://abcnews.go.com/TheLaw/Story?id=5429227>.

⁸⁶ Id.

⁸⁷ Solomon Moore, "Push on Immigration Crimes Is Said to Shift Focus," New York Times, January 11, 2009, available at <http://www.nytimes.com/2009/01/12/us/12prosecute.html>.

⁸⁸ "Immigration Cases Drive Federal Prosecutions to New High in FY 2008," Transactional Records Access Clearinghouse, January 12, 2009, available at <http://trac.syr.edu/whatsnew/email.090112.html>.

⁸⁹ Spencer Hsu, "Immigration Prosecutions Hit New High," Washington Post, June 2, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/06/01/AR2008060102192_pf.html.

statutes, but also regulations and requirements under those statutes. This sweeping and unprecedented authority should be repealed or substantially modified.

Recommendation:

- To signal a more tempered and respectful approach to border community issues, the Obama Administration should rescind or modify existing assertions of waiver authority by giving notice in the Federal Register.

Establish an independent Border Enforcement Review Commission: The Bush Administration implemented extensive border security policies and programs with limited involvement by the border communities that endured hardships ranging from racial profiling, to excessive delays at port of entry, to intrusive lights and other technology that have diminished quality of life.

Recommendation:

- Establish an independent commission to study border security programs and policies composed of Administration officials and members of the community and civil society. The commission should review the protection of human and civil rights of border community residents and migrants; the adequacy and effectiveness of training for border personnel; the adequacy of DHS complaint procedures; the effects of operations, technology, and enforcement infrastructure on the environment; cross-border traffic and commerce; quality of life of border communities; and local enforcement of federal immigration laws.

Commit to improved training for Border Patrol: The new Administration must ensure that DHS hire, train, and retain highly qualified agents who receive adequate training in immigration law, civil and human rights, and community relations to ensure that all individuals are treated humanely and with full respect for their rights.

Recommendation:

- Direct CBP to provide humane treatment to the border-crossers it apprehends by improving detention conditions, including providing adequate food, medical care, religious counsel, and legal assistance.

Repeal the expansion of expedited removal: In 2004, Secretary Chertoff authorized “expedited removal” against persons arrested inside the United States. See 69 Fed. Reg. 48877 (Aug. 11, 2004). This action authorized application of expedited removal to persons within the United States who are apprehended within 100 miles of the border and who are unable to demonstrate that they have been continuously physically present in the country for 14 days. The application of this summary process to individuals in the interior of the United States results in the expedited removal of individuals who may have valid claims to immigration status, such as those with U.S. citizen or resident relatives, as well as trafficking victims or individuals with asylum claims.

Recommendations:

- Repeal the 2004 modification of the “expedited removal” policy, which expanded the scope of the policy to include persons arrested inside the United States. Individuals suspected of being undocumented immigrants who are present inside the United States should not be removed without meaningful administrative review.
- End the use of “expedited removal” for children in immigration proceedings.

VII. Backlog Reduction

A. Family and Employment Immigration and Nonimmigrant Visa Processing

The Department of Homeland Security should take substantial steps to resolve the family-based backlog that has grown exponentially in the last decade. A clear picture of visa backlogs is not available in order for officials to make informed decisions about how to stabilize legal immigration backlogs. The number of family members waiting abroad to immigrate through the family preference categories is available through the State Department,⁹⁰ but the number of individuals waiting in the United States to adjust their status through family-based visas is not made available by USCIS. The Department should take steps to ensure that data regarding the numbers of individuals in the family-based, employment-based and other immigration categories is available and accurate.

Count all filed I-130 petitions: Countless I-130 petitions have been filed with USCIS, but the total number of these petitions does not appear to be tracked or publicly disclosed by the agency. USCIS should track the number of petitions that have been filed in order to accurately assess the overall backlog and the availability of visas. In order to fairly allocate resources, USCIS should adjudicate these petitions shortly before the priority date becomes current.

Use all available visas: DHS and the Department of State typically fail to use the total number of allocated visas each year because of numerical limitations, country caps, and bureaucratic delay.

Recommendations:

- **Resolve general workflow inefficiencies:** In June 2008, the USCIS Ombudsman recommended that the agency modify its counting procedures to track how long each application has been pending, rather than averaging backlog numbers.⁹¹ Reformulating its calculations will provide a more precise backlog number and help the agency plan accordingly.
- **Provide additional resources for processing visa applications and petitions:** USCIS and the Department of State must prepare now for potential changes in law that may increase the number of available visas or other benefits. The agencies must be prepared to respond to such changes without hindering the current workflow.
- **Include increased funding and staffing increases for USCIS and DOS in the President's budget.**
- **Support legislative proposals to recapture lost employment-based and family-based visas and create a mechanism to "roll-over" unused visas to the next fiscal year.**

Decrease wait times by retention of priority dates across all family categories: When an immigrant petition for an alien relative is approved, the initial filing date of the petition becomes the priority date for the beneficiary in a specific family preference classification. While USCIS has not definitively ruled on the subject, it appears to take the position that if family circumstances change, the priority date is lost, the family member "goes to the back of the line," and that family member re-starts the lengthy wait. By contrast, in the employment preference system, once a petition is approved under the first, second, or third preference categories, the priority date of the first approved petition applies to any subsequently filed petition. No such interpretation has been stated for the family preference categories.

Recommendations:

- **Amend the regulations by adding the following:**

⁹⁰ That number is approximately 2.7 million individuals. See U.S. Department of State, Visa Bulletin, Number 6, Volume VIII, Washington, D.C.

⁹¹ USCIS Ombudsman Annual Report to Congress 2008, at vii-ix, 5-7, available at http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf

“Retention of INA § 203(a) priority date – A petition approved on behalf of an alien under INA § 203(a)(1)(2)(3) or (4) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under INA § 203(a) for which the alien may qualify. In the event that the alien is the beneficiary of multiple petitions under INA § 203(a), the alien shall be entitled to the earliest priority date.”

- If an amendment of the regulations is not feasible, at a minimum the Child Status Protection Act should be interpreted to preserve the original priority date when a beneficiary converts to a different preference category by virtue of a change in circumstances, such as a child reaching age 21 and thus “aging out” of the original category.

Use available discretion to promote family unity: USCIS should adopt a policy of generously granting both fee waivers and discretionary waivers, especially in cases in which individuals in proceedings have immediate family members who are U.S. citizens.

Recommendations:

- Take a more comprehensive and fair view of the hardship requirement in family waiver cases, especially where the re-entry bars are the only obstacle to family reunification.
- Support legislative proposals to expand USCIS’ authority to grant waivers for individuals with pending family-based petitions and/or family members in the United States.
- Ensure that HHS removes HIV from the list of “communicable diseases of public health significance,” a list which has the effect of severely limiting such immigrants’ ability to (a) obtain immigrant or non-immigrant visas or (b) to adjust their status.

B. Naturalization Backlog Reduction

In fiscal year 2007, 1.4 million lawful permanent residents — a near record number — applied for naturalization, demonstrating their loyalty to the United States and a desire to fully integrate. The surge in naturalization applications preceded a planned fee increase, yet the agency did not adequately prepare. As a result, many applicants waited for very long periods of time — as long as 16-18 months — for their applications to be adjudicated. While USCIS has made progress in reducing adjudication delays, there are still great disparities in waiting times in USCIS districts throughout the nation. In September 2008, the agency projected wait times to range from 10-12 months.⁹²

A number of naturalization applicants experience long delays while the FBI completes a name check. The name check is only one of many background checks, yet it is commonly responsible for lengthy delays, even where the applicant has never been the target of an FBI investigation. Some policymakers, including the USCIS Ombudsman, have questioned whether the FBI name check has security value commensurate to the costs it places on the system. In its 2007 and 2008 reports to Congress, the Ombudsman recommended that USCIS “reassess the value of the name check in its current format and establish a risk-based approach to screening for national security concerns.”⁹³

⁹² “Update on Pending FBI Name Checks and Project Naturalization Processing Times,” Department of Homeland Security, Sept. 9, 2008, available at http://www.dhs.gov/xnews/releases/pr_1220993097713.shtm.

⁹³ USCIS Ombudsman Annual Report to Congress, June 2008, at 5, available at http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf.

Create naturalization advisory committees in each district: USCIS should create naturalization advisory committees that meet regularly with USCIS district staff to discuss customer service issues and other challenges facing applicants.

Recommendations:

- USCIS should create a naturalization advisory committee in each district comprised of a broad range of naturalization assistance, adult education, and advocacy groups that fully represent the diversity of the immigrant population served by the district.
- USCIS should incorporate the implementation of such advisory committees into the performance objectives developed for its district personnel.

Establish “troubleshooting” units in each office for backlogged or problem cases: Naturalization applicants should be able to contact designated personnel to obtain specific information about the reason for the delay in their applications and what actions the agency is taking to resolve it. In order to determine the most effective approaches for operating these units, the agency should undertake an assessment of those offices with the “best practices” for problem-case resolution.

Recommendations:

- USCIS should develop managerial and operational models that can be adopted agency-wide.
- USCIS should establish a special unit in each district office responsible for “troubleshooting” backlogged or other problem cases.

Assess FBI name check review: As noted above, serious questions have been raised about the utility of FBI name checks in promoting national security. Given the clear administrative problems and lengthy delays associated with the name check process, a thorough review of this process is long overdue.

Recommendation:

- Conduct an interagency assessment of the value and efficacy of FBI name checks in protecting national security and revealing useful information about applicants’ eligibility for naturalization. This assessment should examine whether the name checks can provide relevant information that cannot be otherwise obtained from other naturalization background checks.

C. Adjudications

USCIS has experienced tremendous growth over the past 18-24 months as it expanded staff to adjudicate the surge in applications received in advance of the fee increase in the summer of 2007. Yet, USCIS and its predecessor, the INS, have long struggled to efficiently adjudicate applications for benefits under the immigration laws. The review envisaged by Secretary Napolitano’s directive should include an examination of USCIS adjudication policies for both nonimmigrant and immigrant visa petitions.

Specifically, USCIS should not issue Requests for Evidence (RFE) and Notices of Intent to Deny (NOID) that are burdensome and intrusive, or that bear no relevance to the visa categories involved. In addition, the agency should refrain from demanding information and evidence that is already of record.

Transparency: Transparency is a hallmark of the Obama Administration and is critical to achieving credible and effective agency practice. In the spirit of open government, USCIS should make available key materials that are being relied upon by agency officials in adjudicating applications. Through both informal channels and Freedom of Information Act requests, stakeholders have requested copies of standard operating procedures, policy memoranda, training syllabi, and other field guidance that

articulate the policies, procedures, and standards applied by adjudicators. None of that material has been disclosed.

Recommendation:

- USCIS should disclose the materials that guide examiners in adjudicating applications so that stakeholders can prepare applications in accordance with applicable guidance, improving efficiency throughout the system.

Preponderance of the Evidence Standard: The “preponderance of evidence” standard of proof requires that the petitioner demonstrate that an assertion contained in an application is more likely than not to be true. It does not require the petitioner to demonstrate eligibility beyond a reasonable doubt. That standard should be applied broadly in accordance with Interoffice Memorandum from William R. Yates, Associate Director, Operations, “Requests for Evidence (RFE) and Notices of Intent to Deny (NOID),” (HQOPRD 70/2, February 16, 2005⁹⁴, and in the designation of *Matter of Chawathe* (A74 254 994, AAO, January 11, 2006 by Acting Deputy Director Robert C. Divine.⁹⁵

Recommendation:

- DHS should adjudicate the vast majority of applications using the “preponderance of the evidence” standard.

VIII. Widows and Widowers

Today, USCIS is deporting the widows and widowers of American citizens, automatically and without exception, where the death of the American spouse occurred before lengthy administrative visa processing could be completed. This practice is illegal and unnecessary.

The USCIS claims it cannot approve an application for permanent residence when a spouse is killed before the bureaucracy acts on the couple's residency application. The agency asserts that there are no exceptions to this rule. Without an administrative policy change, or a technical amendment to the immigration law, USCIS will continue to compound the loss of these surviving spouses, making them face deportation, lose employment authorization, and cope with separation from family members and the home they made with their American spouses. This injustice is not required by current law, and the policy should be reversed immediately.

On November 23, 2008, CBS News’ “60 Minutes” exposed the Widow Penalty to a national audience. As Bob Simon reported in the “60 Minutes” segment,

Raquel, like all the other widows 60 Minutes met, had entered the U.S. legally. Still, immigration has been rejecting requests for permanent residence if the American spouse died before they had their immigration interview to prove their marriage was based on love. But the government can take months – sometimes more than a year – to schedule that interview. Raquel’s mother-in-law, Linda, says Raquel shouldn’t be penalized because the bureaucracy didn’t move fast enough. ‘They were doing things legally. They filed the right papers. They filed them in a timely manner. Things were not processed in a timely manner. And ... then my son died. This was not something that you can foresee,’ Linda says.⁹⁶

⁹⁴ Available at <http://www.uscis.gov/files/pressrelease/RFE021605.pdf>

⁹⁵ Available at <http://www.uscis.gov/files/article/Chawathe011106.pdf>

A. Implement the Holding in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) Nationwide

We urge the administration to recognize, as a number of Courts have found, that a spouse does not cease to be a spouse when the American spouse dies during routine bureaucratic processing of an immigration benefit. See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Taing v. Chertoff*, 2007 U.S. Dist. LEXIS 911411 (D. Mass 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, 2008 U.S. Dist. LEXIS 889 (D. Ohio 2008), *appeal docketed*, No. 08-1179 (6th Cir. 2008). Additionally, other lawsuits have been filed around the country, costing taxpayers money and wasting scarce government resources. *Hanford v. Chertoff*, Civ. No. SA-08-CA-0795 (XR) (W.D. Texas, Sept. 25, 2008); *Kells v. Chertoff*, No. 08-CV-1582-CAS (E.D. Missouri, Oct. 14, 2008); *Robledo v. Chertoff*, No. AW-08-CV-2581 (D. Maryland, Oct. 2, 2008); *Gorovets v. Chertoff*, No. 08-10094 (LAP) (S.D.N.Y., Nov. 20, 2008); *McKoy v. Chertoff*, No. 08-3274 (DKC) (D. Md., Dec. 4, 2008).

Government lawyers have appealed these rulings, and recently persuaded the Third Circuit that their reasoning had merit. On February 2, 2009, the Third Circuit decided *Robinson v. Napolitano, et al*, --- F.3d ---, WL 223856, No. 07-2977 (3d Cir. Feb. 2, 2009), in which the majority in a 2 to 1 decision expressly disagreed with the holding in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

Regrettably, the *Robinson* decision was not well reasoned. Dissenting Judge Nygaard called the majority opinion “fatally flawed.” The majority in *Robinson* evidenced a clear misinterpretation of the “two-year rule” and failed to consider key statutes that were carefully considered by the *Freeman* court, as outlined more fully in the detailed memorandum attached to this document.

Recommendations:

- Rescind the Memorandum issued by Michael Aytes, Associate Director of Domestic Operations, USCIS, on November 8, 2007, and issue a new Memorandum implementing the *Freeman* decision nationwide. The memorandum should not include the unnecessary and unlawful requirements⁹⁷ that were included the Aytes Memorandum and are currently being challenged in a class action lawsuit.⁹⁸ Because no current regulations are implicated in this type of case, the Secretary has the option of issuing a Memorandum that makes changes to the Adjudicator’s Field Manual.
- The Secretary of Homeland Security should publish a precedent decision following the decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), with the concurrence of the Attorney General, pursuant to the Secretary’s powers under 8 CFR § 1003.1(h)(2)(i), and file the decision with the Board of Immigration Appeals for publication as a precedent in future.

⁹⁶ “For Better or For Worse – A Loss of Love and Country,” 60 Minutes, CBS News, Nov. 23, 2008, available at <http://www.cbsnews.com/stories/2008/11/21/60minutes/main4625729.shtml>

⁹⁷ The Aytes Memorandum imposes unlawful requirements that the beneficiary “present a request under 8 CFR § 205.2(a)(3)(C)(2) for humanitarian reinstatement, supported by a properly completed Form I-864 from an individual who qualifies under § 213A(f)(5)(B) of the Act as a qualifying substitute sponsor” or the petition will automatically be revoked. Memorandum, p. 7, AFM Ch. 21.2(a)(4)(B)(2). Both requirements are unlawful.

⁹⁸ See *Hootkins v. Chertoff*, No. 07-05696 (CAS) (C.D. Cal., filed August 30, 2007) (challenging the substitute affidavit of support requirements and humanitarian reinstatement requirements as unlawful and *ultra vires*).

proceedings. The Secretary's published decision should adopt the reasoning of the Court in *Freeman* and reject the reasoning of the Court in *Robinson*. Further, the Secretary should clarify that the substitute affidavit of support requirements of the Aytes Memorandum may only be required where no I-864 was ever executed by the petitioner, and further that the humanitarian reinstatement requirements are not to be applied in any case.

The decision could designate a case currently in removal proceedings, such as Mrs. Maria Paula Robledo. (See *Robledo v. Chertoff*, No. AW-08-CV-2581 (D. Maryland, Oct. 2, 2008). Additionally, because the fiancée adjustment procedure differs slightly from those who enter legally on other visas, the Secretary should also designate a case in which the applicant initially entered as a K-1 fiancée and married the petitioner, such as Mrs. Gwendolyn Hanford. (See *Hanford v. Chertoff*, Civ. No. SA-08-CA-0795 (XR) (W.D. Texas, Sept. 25, 2008). Both the *Hanford* case and the *Robledo* case have received final administrative denials, and both are in removal proceedings.

B. Implement the Holding in *Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968) Nationwide

In addition to terminating action on pending applications, the agency has also engaged in automatic revocation of petitions that were already approved at the time of the petitioner's death. The procedure for revoking the approval of visa petitions has been misused for many decades. Yet the regulations purporting to automatically revoke a visa petition upon the death of the petitioner have been rejected repeatedly by Circuit Court of Appeals in the context of the widow penalty.⁹⁹ Three decades after the automatic revocation provisions of 8 CFR § 205.2(a)(3)(C)(2) were promulgated, the Second Circuit opined that it could "hardly imagine" that Congress intended 8 U.S.C. § 1155 to result in automatic revocation of a visa petition upon the death of the citizen spouse. *Pierno*, 397 F.2d 949, 951 (2d Cir. 1968). The automatic revocation regulations found at 8 CFR § 205.2(a)(3)(C)(2) frustrate the intent of Congress and are *ultra vires*. Consequently, the automatic revocation regulations do not constitute a "permissible construction of the statute" found at 8 U.S.C. § 1155, and are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44.

Following the Second Circuit's 1968 opinion in *Pierno*, a proposed regulation change was published. Specifically, the proposed regulation promised,

Proposed amendments to Part 205. In § 205.1, it is proposed to include a reference to part 203(e), as amended, respecting automatic revocation of approval of visa petitions. In § 205.1(a)(2), it is proposed to delete the words "petitioner or", and add a new § 205.1(a)(3) which will provide that a relative visa petition will not be automatically revoked upon the death of the petitioner.¹⁰⁰

Despite the legitimate proposal to provide that a relative visa petition will not be automatically revoked upon the death of petitioner, as would have been in keeping with the decision in *Pierno*, the agency instead issued a final regulation providing for automatic revocation upon the death of the petitioner, "unless the Attorney General in his discretion determines that for humanitarian reasons revocation would be inappropriate."¹⁰¹ The "humanitarian reinstatement" rule was thus born, and despite its

⁹⁹ See, e.g., *Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968); *Freeman*, 444 F.3d 1031

¹⁰⁰ 41 Fed. Reg. 220, 49996, Nov. 12, 1976.

¹⁰¹ 41 Fed. Reg. 248, Dec. 23, 1976.

intentions, it continues to haunt families and their surviving relatives. The humanitarian reinstatement rule is not lawful and should be abolished. New regulations that properly reflect the intent of Congress should be promulgated after notice and comment, and should do away entirely with automatic revocation where the death of the petitioner occurs during bureaucratic visa processing, as was proposed in 1976.

Recommendations:

- Promulgate new regulations under § 205 which provide guidance to adjudicators on the lawful reasons for exercise of the revocation authority for “good and sufficient cause” such as fraud, deceit or mistake.
- Eliminate (a) automatic revocation of petitions due to death of the petitioner and (b) the unlawful “humanitarian reinstatement” exception. The revised regulation should provide that properly filed petitions that were approved shall remain valid despite the death of the petitioner after approval. This simple regulatory change will eliminate government waste and ease the suffering currently endured by families that have suffered the tragedy of a death. It will also bring the regulations into harmony with the *Pierno* decision and faithfully carry out legislative intent. Current procedures on humanitarian reinstatement make it difficult to determine which agency or office has jurisdiction over the request, and entail the needless and costly transfer of files between the State Department and the USCIS, resulting in delay and wasted resources.

Addendum A: Protocol for Worksite Enforcement Actions

A. Steps To Be Taken By ICE Prior to a Worksite Enforcement Action

- 1) ICE agents are authorized to enter that part of a workplace where a worker has no reasonable expectation of privacy to arrest an individual alleged to be in the United States without authorization, after obtaining either:
 - a. An administrative arrest warrant upon a showing of probable cause to believe that such person is removable; *or*
 - b. A judicial arrest warrant upon a showing of probable cause to believe that such person has committed a federal criminal offense.

ICE therefore should take steps to ensure that such warrants are obtained from the relevant issuing authority in advance of any worksite raid.

- 2) ICE should not undertake any enforcement actions in a workplace in which there is an ongoing labor dispute. Toward that end, ICE agents should cooperate and coordinate with federal or state labor law enforcement agencies in conducting workplace raids. Before acting on information (including an anonymous tip) from any source concerning the alleged employment of unauthorized individuals, ICE agents should investigate whether any ICE action would interfere with an ongoing labor dispute, as follows:
 - a. ICE should contact the Department of Homeland Security Office of Civil Rights and Civil Liberties (OCRCL) and the latter should coordinate with the relevant regional office of the National Labor Relations Board; the United States Department of Labor; the Equal Employment Opportunity Commission, the Office of Special Counsel for Immigration-Related Unfair Employment Practices in the Department of Justice (OSC), and state labor and employment agencies to obtain information on any pending investigations or complaints involving the employer.
 - b. ICE should follow best practices in developing information provided through any source or informant, including anonymous tipsters. ICE should determine, if possible, the following: (1) the name of the source; (2) whether the source is employed at the reported worksite or by a labor union connected with the worksite and if so, in what capacity; (3) whether the source is aware of any labor dispute or ongoing labor organizing in progress at the worksite or against the reported employer; (4) how the source obtained the reported information. ICE agents contacting any source should take steps to assess the reliability of any source prior to initiating any worksite law enforcement action by questioning the source and independent investigation.
 - c. If ICE is not able to establish that the information was not provided in order to interfere with or to retaliate against employees for exercising their labor or employment rights, no enforcement action should be taken on the information unless it sought and received approval from the Director of the Worksite Enforcement Unit at ICE-HQ.
 - d. If in the process of an investigation of a worksite, ICE discovers that an employer is engaged in labor violations, ICE should contact the OCRCL and OSC to coordinate with federal and state labor agencies to ensure that labor laws are properly enforced. So as not to deter workers from cooperating with the government agencies regarding

the labor violations, ICE should suspend its immigration enforcement efforts at least until the labor agencies have completed their investigation and enforcement.

- 3) DHS should provide advance notice of at least 72 hours to state and local child welfare agencies prior to conducting a worksite raid to ensure that the agencies are prepared to assist in making arrangements for any children affected by arrests during the raid.
- 4) DHS should provide advance notice of at least several hours to federal, state or local social service agencies, including government agencies and nonprofit organizations, to coordinate humanitarian assistance to arrestees and other workers during the raid.

B. Recommendations for Conduct of ICE Agents During Worksite Raids

- 1) In executing an arrest warrant at a workplace, the ICE agent should provide the arrestee with a copy of the warrant.
- 2) In executing an arrest warrant at a workplace, ICE agents may arrest individuals who are not identified in the arrest warrant if agents have probable cause to believe that such an individual is removable or has committed a federal criminal offense. Race, ethnicity, lack of fluency in the English language, or use of a language other than English shall not constitute probable cause for an arrest.
- 3) ICE agents are authorized to question a person arrested at a worksite, provided that the following procedures are followed:
 - a. The arresting agent shall advise the individual as to the cause for the arrest, and whether it is for purposes of criminal prosecution or administrative removal proceeding;
 - b. The arresting agent shall advise the individual, in a language in which the individual is fluent, that he has a right to remain silent, that he has a right to consult with an attorney at his own expense prior to questioning, and that any statements made may be used in a criminal prosecution or removal proceeding. The arresting agent shall ascertain that the individual has understood the advice of rights.
 - c. In cases in which the arrest is for purposes of an administrative removal proceeding, the arresting agent shall advise the individual that he or she may request release on a bond, and that in the event that bond is denied, he will have an opportunity to seek release before an immigration judge.
 - d. ICE agents should ensure that workplace raids are conducted in a fair and transparent manner so as not to create legal issues that may interfere with the prosecution of subsequent removal or criminal charges. To that end, agents should not seek to obtain any arrestee's consent to a stipulated order of removal, as such mechanisms require procedural safeguards that are difficult to provide at the time of arrest and in particular, during a workplace raid.
- 4) If ICE discovers in the course of a worksite raid that there is an ongoing labor dispute or labor organizing in progress at the worksite, ICE agents should:
 - a. Notify OCRCL to coordinate with federal or state labor, employment or civil rights agencies with jurisdiction over the matter; and
 - b. Provide such labor agencies with the opportunity to interview any individuals at the worksite and to conduct any investigation regarding possible labor law violations.
- 5) ICE agents may take reasonable steps to secure individuals in custody at a worksite in the immediate aftermath of a raid and to limit the detainee's contact with third parties at the worksite in the immediate aftermath of the raid; however,

- a. If an arrestee declines to answer an agent's questions or requests an attorney, there will be no further questioning other than to obtain the arrestee's name for identification purposes; and
 - b. ICE shall not impede a detainee's access to assistance of counsel. Upon transferring a detainee from the site of the arrest to a detention or holding facility, ICE shall permit attorneys and their support staff to have access to detainees so that detainees may retain counsel and confer with counsel.
- 6) ICE agents should take measures to comport with standards for humane treatment of arrestees and other workers affected by a raid, including:
 - a. ICE agents should address medical issues by releasing arrestees, permitting arrestees to obtain medications or to contact medical care providers, and obtaining medical assistance for arrestees and other persons affected by workplace raids. Pregnant women and persons with chronic illnesses should not be placed on electronic ankle bracelet monitoring when released.
 - b. ICE agents should address family needs of arrestees and other workers through humanitarian release or permitting arrestees immediately to make arrangements for the care of minor children or others under the arrestee's care. To this end, once workers are secured, they should be permitted access to their own cell phones to place calls to ensure proper care of dependents. ICE should permit workers to make as many telephone calls as necessary to ensure that proper child care arrangements are made. ICE recognizes that in many instances, this will require more than one telephone call.
- 7) ICE agents should identify themselves as such at the outset of any workplace raid and at the outset of any interaction with an individual encountered during a raid. If agents of other law enforcement agencies are assisting ICE in a workplace raid pursuant to an inter-governmental agreement, such agents who communicate with individuals in the course of the raid should identify their agencies and should explain that their role is strictly to assist ICE in enforcing the immigration laws.

C. Recommendations for Post-Raid Stages of Enforcement

- 1) ICE should take steps to ensure that the detention location of any detained workers does not impede their ability to secure counsel. When planning a large raid, ICE should take steps to ensure adequate detention space in the immediate geographic area and aggressively screen for the ability to release detained workers under an alternative to detention. Only if the detainee is not bond- or release- eligible or in exceptional circumstances should ICE transfer a detainee arrested in a workplace raid outside the immediate geographical area. At a minimum, no detainee should be transferred outside the ICE field office jurisdiction during the first 3 days following their apprehension, and thereafter no detainees shall be transferred who either (1) are represented by counsel; (2) have requested and are awaiting a bond hearing, or (3) have indicated a desire to speak with counsel and/or to obtain relief from removal. In effecting any transfer of a detainee, ICE shall:
 - a. Make all reasonable efforts to detain individuals in the facility nearest their places of residence.
 - b. Maintain at all times a record of the detainee's current location.
 - c. Inform the detainee's counsel, if any, of any transfer and the detainee's current location within 24 hours.

- d. Notify or permit the detainee to notify a relative or other associate of his current location within 24 hours of the transfer. Such communication will be permitted notwithstanding ordinary procedures constraining telephone communications at the detention facility (such as requirements that detainees must establish telephone accounts through third-party service providers).
- 2) ICE should maintain a list of the names and locations of all persons detained after a workplace raid and provide the list to any social service organization upon request.
- 3) If ICE arrests an individual for purposes of removal proceedings, ICE will initiate the removal proceeding through issuance of a Notice to Appear stating the charged grounds for removal within 2 days of the arrest, and immediately thereafter will file the Notice To Appear (NTA) with the immigration court covering the location where the individual was arrested.
- 4) Workers who may be victims of human trafficking, victims of serious or violent crimes, or victims of labor violations shall not be placed in removal proceedings.
- 5) If removal proceedings have been inadvertently initiated against an individual who has filed a workplace claim or who is a material witness in any pending or anticipated proceeding involving a workplace claim, the individual shall be entitled to deferred action and/or a stay of removal and employment authorization. In the event that ICE proves that a workplace claim was filed in bad faith and with the intent to delay or avoid the individuals' removal in order to take advantage of this provision, ICE may initiate removal proceedings against the individual.
 - a. Any stay of removal or employment authorization issued shall remain valid and in effect at least during the pendency of the proceedings concerning such workplace claim.
 - b. The Secretary of Homeland Security shall extend such relief for a period of not longer than 3 additional years upon determining that such relief would enable the individual asserting the workplace claim to be made whole; the deterrent goals of any statute underlying the workplace claim would thereby be served; or such extension would otherwise further the interests of justice.
- 6) In determining whether and what criminal charges should be brought against a person arrested in a workplace raid, the U.S. Attorney's Office shall exercise prosecutorial discretion guided by the general principle that persons believed to be present or employed in the United States without authorization whose offenses were committed solely for the purpose of gaining employment should be subject only to administrative removal proceedings. Criminal prosecution generally should be reserved for individuals with a greater level of culpability, such as individuals who have knowingly assisted others in violating the immigration laws or individuals with prior criminal convictions.
- 7) In the course of a criminal prosecution, the U.S. Attorney's Office shall exercise prosecutorial discretion in the same fair and transparent manner as in any other criminal case.
 - a. The U.S. Attorney's Office should provide defendants with an adequate opportunity to consider any plea offers with the advice of counsel.
 - b. The U.S. Attorney's Office may condition a plea offer upon waiver of rights in a future administrative removal proceeding or upon agreement to a stipulated order of removal, but must provide a defendant with an adequate opportunity to consult with counsel about such provisions. The government recognizes that immigration law may be outside the expertise of members of the federal criminal defense bar, and thus will permit defendants an adequate time to consult with separate immigration counsel when imposing deadlines for a response to a plea offer.

- 8) In the event that a person arrested in a workplace raid is charged with a crime, all ordinary federal criminal procedures should apply.

Addendum B. Procedures for Fugitive Operation Teams

Fugitive Operations Teams should adopt detailed procedures regarding officer conduct during fugitive operations, just as INS developed detailed procedures for worksite enforcement operations in the 1990s, following public attention and scrutiny of reported abusive conduct. At all times, FOTs should remember the importance of maintaining the support of the communities in which they work and the importance of treating all individuals involved, including suspected fugitives, with dignity and respect.

In advance of FOT operation, FOTs should:

- 1) Form an operational plan. In creating the plan, teams should carefully weigh the political context of the operation, including whether the backlash that the operation might create is greater than the additional public safety generated by the operation. The operational plan must be approved by both the head of the local Office of Detention and Removal and by national headquarters.
- 2) Verify that all officers involved have been fully trained on constitutional and legal issues.
- 3) Notify and make arrangements with relevant social service agencies in the city where the operation will take place.
- 4) Create special procedures in case of arrest of persons of humanitarian concern (e.g., sole caretakers of minor children) and those with medical needs.
- 5) Contact local police to go over the operational plan. When calling the local police, it is important to speak directly with a senior law enforcement official in that locality. Absent exigent circumstances, contact with senior law enforcement officials should be made at least five (5) days in advance of any operations.
- 6) Conduct a basic investigation to ensure that the fugitive will likely be inside the target home. Agents need not actually visit the home prior to the raid, but must make a good faith effort, using the information they can access at their desk, to ensure that the person lives at that address and will likely be present at the time of the operation.

During FOT operation, FOTs should:

- 1) Come during hours when residents are likely to be home but are not likely to be sleeping.
- 2) *Show* the warrant to the people inside the house before attempting to enter. Residents should be allowed to inspect the warrant before notifying the person named on the warrant.
- 3) Ask only the particular individual on the warrant to step outside. Do not enter the house unless expressly given consent.
- 4) Expressly ask consent before entering private dwellings unless the officers involved have a search warrant.
- 5) Ensure that officers are able to request and receive consent in the native language.

- 6) Ensure that consent is not sought by minors nor are statements by minors relied upon for consent.
- 7) Inform residents that if the officers enter the residence, they may ask questions of all people in the house.
- 8) Record the name and description of the person giving consent.
- 9) Identify selves (with badge or other identification card) and explain that they are not police officers.
- 10) Inform all people involved that they have the right to call counsel at any time.
- 11) Affirmatively ask residents about medical problems they may have, and make appropriate arrangements if ICE operations could exacerbate those medical problems.
- 12) Do not engage in FOT operations in the presence of minor children. Ask a parent to go with those minor children and stay in another room.
- 13) Do not arrest and detain both parents or guardians of minor children.

c. After an operation, FOTs should:

- 1) Promptly issue a list of the people detained and their whereabouts and give it to the local police and to any social service organization that requests it.
- 2) Notify relatives and cohabitants of the location of detention facilities within 24 hours after the operation.
- 3) Refrain from transferring detained individuals without good cause or without giving the families of those individuals advance notice. Refrain from transferring individuals who have an existing attorney relationship. Detain individuals as close to their places of residence as possible.
- 4) Ensure that there is an effective complaint system to provide redress to individuals who feel that their rights have been violated.
- 5) Notify detained individuals in their native language of their right to call counsel and their right to remain silent.
- 6) Contact local social service agencies to make arrangements for the families and/or children of people arrested.
- 7) Ensure that if an individual with minor children is arrested, his or her spouse or partner is notified in order to ensure that children's well-being is not affected. Do not arrest anyone who is the sole caretaker of a minor child.

- 8) When releasing individuals who have been detained but not arrested, ensure that they have money or transportation to get home. Provide such individuals with a letter giving a written explanation of their mistaken detention so that they can provide it to an employer in case of missed work.

Addendum C. Operational Guidance: Detention

In any enforcement action, ICE officers in the field should take the follow steps to ensure vulnerable populations are not detained:

- 1) **Identifying vulnerable populations.** DHS should screen all immigration detainees within 72 hours of the commencement of an immigration-related enforcement activity to determine if the individual belongs to a vulnerable population group.
- 2) **Defining vulnerable populations.** Vulnerable populations should include individuals who: 1) have serious medical or mental health needs, 2) are pregnant or nursing, 3) are detained with their children, 4) are under 18 or over 65 years of age, 5) are the victims of abuse or human trafficking, 6) are refugees or asylum seekers, 7) are torture survivors, 8) have non-frivolous claims to U.S. citizenship; or 9) are eligible for relief under the Immigration and Nationality Act.
- 3) **Prioritize release options for vulnerable populations.** DHS should establish a policy requiring release of individuals who are members of vulnerable populations within 72 hours of apprehension. Detention should be allowed only for individuals who belong to vulnerable populations if the individual is subject to mandatory detention or there is a substantial factual basis showing the person is a flight risk, a risk to others or to national security. DHS could release these individuals on their own recognizance, by allowing them to post a minimum bond, or on parole in accordance with INA 212(d)(5)(A).
- 4) **Placement of vulnerable populations in alternative to detention programs.** If an individual belongs to a vulnerable population group as defined by this statute but does not meet the requirements for parole, release or bond, DHS should prioritize their placement in a secure alternative to detention program, including the existing Intensive Supervised Appearance Program, Enhanced Supervision and Reporting, and other similar ICE programs.
- 5) **Limit the use of electronic ankle shackles and other burdensome monitoring methods.** In the past year, DHS has resorted to the frequent use of electronic ankle shackles and other intrusive or burdensome monitoring methods for individuals released from physical detention. Rather than reserve these devices and methods for those for whom it is truly necessary—in other words for those who pose an actual flight risk—DHS has made use of such devices and methods part of their default practice whenever someone is released. Electronic ankle shackles are obtrusive to wear and require long periods to charge during which a person must remain near an electric outlet. As a result, they impose significant burdens on the individual and sometimes make it impossible for the individual to work, sleep, or engage in other normal activities. DHS also makes late night or early morning surprise visits upon individual's places of residence that are highly disruptive and frequently unnecessary to effectuate the goals of compliance.

DHS should establish a policy limiting the use of these devices and methods, and should almost never allow their use for vulnerable populations. In all cases, DHS should make an individualized determination as to whether such devices or methods are warranted.

- 6) **Provide written reasons for detention.** DHS should establish a policy requiring officers to provide written explanation of the reasons they have decided to detain an individual. These decisions should be served upon the detainee in the language spoken by the individual within 72 hours after the alien is detained (or not later than 72 hours after a positive credible fear or reasonable fear of torture determination).
- 7) **Opportunity for fair hearing.** DHS in cooperation with DOJ/EOIR should establish procedures granting detainees the opportunity for a hearing before an immigration judge to redetermine a decision to detain an individual.
- 8) **Contract with community-based organizations in release programs.** There have been several successful community-based pilot projects that screen detainees to determine eligibility for release and that subsequently provide services to those released. Nonetheless, DHS has yet to launch a custodial release program that incorporates community-based organizations that commonly have strong ties and established trust in immigrant communities. DHS should contract with non-governmental organizations (NGOs) at a national level to screen detainees for eligibility, provide non-custodial appearance assistance services, or operate group homes and other forms of community-based alternatives.
- 9) **Provide legal orientation presentation programs.** DHS in cooperation with DOJ/EOIR should greatly expand EOIR's legal orientation program to for not only individuals in detention but those being released from detention.
- 10) **Direct DHS to work with DOJ to convene a Task Force with NGOs,** including mental health professionals, to review the conditions, treatment and ethical issues of placing incompetent respondents in removal proceedings without a guardian.
- 11) **Favor release following a grant of protection.** Individuals who have been granted protection by an immigration judge should be released. In addition, unadjusted refugees should not be detained pending adjustment. Prior to the issuance of a November 6, 2007 policy directive, it was ICE policy to favor release of detainees granted asylum, withholding of removal, or protection under the Convention Against Torture, absent exceptional national security or community safety concerns or separate legal requirements to continue detention. This earlier policy was documented in a February 9, 2004 ICE Memorandum from Asst. Secretary Michael Garcia and should be reiterated.¹⁰² ICE should release guidance recommending work authorization.

¹⁰² Available at <http://aila.org/content/default.aspx?docid=10147>.